

No. 16618 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight
Forwarders and/or Furniture Fast Freight, a
Corporation,

Appellee.

Transcript of Record

FILED
FEB - 2 1960

FRANK H. SCHIND, CLERK

Appeal from the United States District Court for the
Southern District of California
Central Division

No. 16618

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight
Forwarders and/or Furniture Fast Freight, a
Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	7
Attorneys of Record	1
Certificate by the Clerk.....	40
Complaint	3
Exhibit A (Attached to Plaintiff's Memorandum) Bill of Lading.....	17
Judgment	28
Minute Entry June 8, 1959 Denying Motion...	34
Motion to Reconsider.....	29
Ex. A—Affidavit of Hillis K. Wilson.....	29
Notice of Appeal.....	35
Opinion	19
Pre-Trial Stipulation of Facts and Issues.....	10
Order Re	15
Statement of Points on Appeal.....	43
Stipulation Re Findings of Fact and Conclusions of Law.....	27
Supplemental Stipulation of Facts.....	15
Order Re	16
Transcript of Proceedings.....	36

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
U. S. Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney;

JORDAN A. DREIFUS,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

For Appellee:

TURCOTTE & GOLDSMITH,
565 South Los Angeles Street,
Los Angeles 14, California.

United States District Court, Southern
District of California, Central Division
Civil No. 313-58—HW

UNITED STATES OF AMERICA,
Plaintiff,
vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight
Forwarders and/or FURNITURE FAST
FREIGHT, a Corporation,
Defendants.

COMPLAINT FOR RESTITUTION

Plaintiff, United States of America, complains of
defendants and for cause of action alleges:

I.

This is a suit by the United States of America of
which this Court has jurisdiction under 28 U.S.C.
1345.

II.

The defendant, Furniture Fast Freight, is a cor-
poration organized under the laws of the State of
California, having its principal place of business at
Los Angeles, California, within the Central Division
of the Southern District of California and within
the jurisdiction of this Honorable Court.

III.

The defendant, Melvin A. Pixley, d/b/a Furni-
ture Freight Forwarders and/or Furniture Fast
Freight is a resident of the County of Los Angeles,
State of California, within the Central Division of
the Southern District of California and within the
jurisdiction of this Honorable Court.

IV.

At all times material to this case, the defendants, in numerous transactions, furnished to the plaintiff, trucking, hauling, and other freight transportation services, and was and is a common carrier subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66.

V.

The furnishing of such services in all such transactions, was, as to payment therefor by the plaintiff, subject to the terms of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, in that plaintiff was required to make payment for the furnishing of said services, upon the presentation of the bills therefore by the defendants, prior to audit or settlement by the General Accounting Office of the plaintiff, but with the right reserved to the plaintiff to deduct the amount of any overpayment to the defendants from any amount subsequently found to be due defendants.

VI.

In every such transaction of the furnishing of such services to the plaintiff, the defendants submitted their bill and voucher for payment therefor to the plaintiff. The plaintiff in every instance upon presentation of said bill and voucher and acting through its duly authorized disbursing officer, made payment to the defendants in the amounts stated in such bill and voucher, prior to audit or settlement of said bill or voucher by the General Accounting Office of the plaintiff.

VII.

Each such transaction of the furnishing of such services and the payment made as aforesaid is listed and described as a separate item in the entries incorporated below in this paragraph, in tabulations prepared by the Transportation Division of the General Accounting Office, copies of which are attached hereto as Exhibits A, B, C, D, E and F. The entries in the following entitled columns of Exhibits A, B, C, D, E and F are incorporated in this paragraph by reference as if fully set forth:

“Item No.

“Carrier’s Bill No.

“Bill of Lading (Number, Date).

“Origin.

“Destination.

“Commodity.

“Weight.

“Amount Paid.”

VIII.

In due course the General Accounting Office proceeded to audit and settle the aforesaid bills and vouchers presented by the defendants, as a result of which, that Office determined the amount properly and lawfully due in settlement of each bill or voucher. Such proper and lawful amount due is set forth, as to each item listed in Exhibits A, B, C, D, E and F attached hereto, in the column entitled:

“Charge Should Be (Rate cwt. Amount.)”

IX.

As to each item listed on Exhibits A, B, C, D, E and F, the “Amount Paid” was in excess of the

amount properly and lawfully due in settlement of such item by the amount listed in Exhibits A, B, C, D, E and F in the column entitled:

“Overpayment.”

X.

All of the aforesaid overpayments are moneys had and received by the defendants to the use and benefit of the plaintiff. The total amount of those overpayments is in the sum of \$17,666.77. Plaintiff has demanded of defendants said sum plus proper interest thereon, but none of said overpayments or any part of them have been repaid by the defendants to the plaintiff; but all of them remain due, owing and unpaid to the plaintiff.

Wherefore, plaintiff prays judgment as follows:

(a) For the total of said overpayments in the sum of \$17,666.77;

(b) For interest at the rate of 6 per cent per annum on the amount of each overpayment from the date of payment;

(c) For costs; and

(d) For such other and further relief as the Court may deem proper.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

ANSWER

Come Now Melvin A. Pixley and Pixley Transportation, a corporation (sued herein as Furniture Fast Freight), and answer the complaint on file herein by admitting, denying and alleging as follows:

I.

Answering paragraph II, allege that prior to the filing of the complaint herein, the corporation sued as Furniture Fast Freight had changed its name to Pixley Transportation.

II.

Answering paragraph III, allege that defendant Melvin A. Pixley is not doing business as Furniture Freight Forwarders or Furniture Fast Freight.

III.

Answering paragraph IV, deny, that any defendant at any time was or is a common carrier subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, or otherwise.

IV.

Answering paragraph V, deny, generally and specifically, each and every allegation contained therein and the whole thereof.

V.

Answering paragraph VI, allege that said transactions involved defendant Melvin A. Pixley only,

and did not involve Pixley Transportation, formerly known as Furniture Fast Freight.

Further answering said paragraph, defendants do not have sufficient information or belief to enable them to answer the allegation that payment was made to defendant Melvin A. Pixley prior to audit or settlement of said bill or voucher by the General Accounting Office of the plaintiff, and basing their answer on lack of information or belief deny said allegation.

VI.

Answering paragraph VIII, deny, generally and specifically, each and every allegation contained therein and the whole thereof, and deny that the proper or lawful rates or charges are set forth in the exhibits attached to the complaint, and deny that said exhibits reflect the proper and lawful amount due to plaintiff, and deny that any amount is due plaintiff from defendants, or either of them.

VII.

Answering paragraph IX, deny, generally and specifically, each and every allegation there set forth and the whole thereof, and deny that any overcharge has been made by defendants, or either of them, and deny that plaintiff has paid any defendant any overpayment.

VIII.

Answering paragraph X, deny, generally and specifically, each allegation set forth therein and the whole thereof and deny that the total amount of the overpayments is \$17,666.77, or any other amount,

and deny that any overpayment has been made. Further answering said paragraph, allege that the first demand made upon defendants, or either of them, for the refund of any alleged overpayments occurred in September of 1952, and allege that on or before August 15, 1956, defendants declined all claims of the plaintiff and denied that any amount was due to plaintiff.

For a Second, Separate and Affirmative Defense, Defendants Allege:

I.

The above-entitled court lacks jurisdiction of the subject matter of the complaint because the alleged cause of action became totally extinguished prior to the commencement of this action.

For a Third, Separate and Affirmative Defense, Defendants Allege:

I.

The complaint fails to state a claim against the defendants, or any of them, upon which any relief can be granted.

For a Fourth, Separate and Affirmative Defense, Defendants Allege:

I.

Each claim of plaintiff in connection with each shipment mentioned in the complaint was extinguished prior to the institution of the subject action by reason of the failure of the plaintiff to file any claim with any defendant or to institute suit within

the period of time provided by the Public Utilities Code of the State of California and within the period of time prescribed by Section 736 of said Code.

Wherefore, defendants, and each of them, pray that plaintiff take nothing by its complaint on file herein, and that they be dismissed hence with their costs of suit, and such other relief as the court may deem proper.

TURCOTTE & GOLDSMITH,

By /s/ J. O. GOLDSMITH,

Attorneys for Defendants.

[Endorsed]: Filed January 30, 1959.

[Title of District Court and Cause.]

PRETRIAL STIPULATION OF
FACTS AND ISSUES

I.

Facts

The following facts are stipulated to by the parties herein and will require no proof at the time of trial:

1. At all times herein involved defendant, Melvin A. Pixley, was a highway common carrier of furniture and certain related commodities from, to and between the points herein involved pursuant to certificates of public convenience and necessity

theretofore issued to him by the Public Utilities Commission of the State of California authorizing said Pixley to transport furniture and certain related articles over the public highways of the State of California and not otherwise.

2. All of the shipments involved in this proceeding were tendered by the plaintiff to the defendant, Melvin A. Pixley, for transportation at a point in California to a destination in California and moved only over the public highways of the State of California.

3. The first shipment involved in this case was transported and delivered by defendant, Pixley, on July 3, 1943, under Bill of Lading NHA-FPHA 25270, and moved from Inglewood, California to San Francisco, California. The last shipment involved herein was delivered on October 10, 1947, and moved from Los Angeles, California, to San Francisco, California, under Bill of Lading No. HAPH 255736.

4. During the period in which Pixley received and transported the shipments of furniture and other household articles enumerated in plaintiff's complaint, Pixley, as such common carrier, had on file with the Public Utilities Commission of the State of California, his tariffs of rates, rules and regulations, designated Furniture Fast Freight Tariff No. 1, Public Utilities Commission No. 1 prior to February 13, 1944, and Furniture Freight Forwarders Tariff No. 100, California Public Utili-

ties Commission No. 1, on and after February 13, 1944.

5. Pixley, after transporting the involved shipments from origin to destination, and after delivering the same to the consignee at destination, issued his freight bill setting forth his charges for his services in the transportation of said shipments from origin to destination, and presented the same to the United States of America for payment. All of the shipments involved were delivered by Pixley to the consignees named in the bills of lading on or before October 11, 1947.

6. The Federal Public Housing Authority is an agency of the United States Government and it constructed housing accommodations used by persons as their homes and residences.

7. All transportation herein involved was performed for the plaintiff and all moved on Government bills of lading.

II.

Issues to Be Tried

1. Is this case governed by the Public Utilities Code of the State of California, and particularly by Section 736 of said Code?

2. If the Code or particular section of said Code mentioned in the preceding number controls in this case, has the same extinguished prior to the institution of the subject action each claim of plaintiff in connection with each shipment mentioned in the complaint, at least in connection with all shipments

pertaining to uncrated new furniture and related commodities, being the commodities for which defendants hold a certificate of public convenience and necessity from the State of California?

3. Is this case governed by Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, and is said statute pertinent to this lawsuit in any respect?

4. Is this case governed by the Act of June 1, 1942, Title 31, U.S.C., Sec. 82(g), and is said statute pertinent to this law suit in any respect?

5. Is any defendant a common carrier subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, or otherwise?

6. Was the furnishing of the transportation services involved in this case, as to payment therefor by the plaintiff, subject to the terms of Section 322 of the Transportation Act of 1940, 49 U.S.C. 66?

7. Were all of the component parts of each shipment as listed on each individual bill of lading involved in this case tendered to one of the defendants at one time for transportation in accordance with such bill of lading?

8. Has there been any overpayment from the plaintiff to any defendant in connection with the shipments referred to in the complaint and if so what is the amount of the overpayment?

9. Was any claim made by the plaintiff against any defendant for any alleged overcharge on any ship-

ment involved within three years from the date of the delivery of said shipments?

10. Of the amount sought to be recovered, viz.: \$17,666.77, did \$436.63 consist of Federal Transportation Tax of 3% of the amount of the freight charges assessed and collected on 48 shipments so transported by Pixley for the plaintiff. If so, was the \$436.63 so collected as a transportation tax from the plaintiff by Pixley for and on behalf of the United States of America as a Federal tax, and did Pixley remit the amount so collected by him to the United States of America as a Federal tax on the transportation of said shipments, and has Pixley retained any part or portion of the said tax so collected; and was said transportation tax remitted by Pixley to the plaintiff and paid to the United States of America, many years prior to the commencement of this action?

Dated: This 24th day of February, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

TURCOTTE & GOLDSMITH,

By /s/ JACK O. GOLDSMITH,
Attorneys for Defendants.

It Is So Ordered:

This 26th day of Feb., 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed February 26, 1959.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

The following additional facts are stipulated to by the parties herein and will require no proof at the time of trial:

1. On August 15, 1956, the defendant Pixley declined all claims of plaintiff and informed the plaintiff, in writing, that no overcharge existed and that Pixley was not indebted to plaintiff for any overcharge, or otherwise.

2. Add to the Pretrial Stipulation of Facts and Issues, dated February 24, 1959, at page 1, line 32, after the word California the words "at said carrier's tariff rates."

3. No defendant at any time had on file with the Interstate Commerce Commission any tariff covering any movement from, to or between any of the points pertinent to the above-captioned proceeding.

Dated: March 16, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

BURTON C. JACOBSON,
Assistant U. S. Attorney;

/s/ BURTON C. JACOBSON,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

TURCOTTE & GOLDSMITH,

By /s/ JACK O. GOLDSMITH,
Attorneys for Defendants.

It Is So Ordered this 25th day of March, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed March 25, 1959.

Standard Form No. 1100
Form approved by
Comptroller General, U. S.
1943

EXHIBIT A
U. S. GOVERNMENT BILL OF LADING
ORIGINAL

J- 425817

CAR INITIALS AND NO. DO NOT WRITE IN THIS SPACE

NAME OF INITIAL TRANSPORTATION TRAFFIC CONTROL NO.

COMPANY \rightarrow
STOP THIS CAR AT \rightarrow FOR

IMPORTANT
THE SHIPPER MUST
SEND THIS ORIGINAL OF
THE BILL OF LADING TO
THE CONSIGNEE IMMEDI-
ATELY.
SEE REVERSE HEREOF

SIZE CAR IN FEET		MARKED CAPACITY OF CAR		DATE CAR FURNISHED	DATE B/L ISSUED
ORDERED	FURNISHED	ORDERED	FURNISHED		

FROM
SHIPPING POINT \rightarrow
FROM (FULL NAME OF SHIPPER)

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

MARKS

CONSIGNEE

CHARGES TO BE BILLED TO (DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION)
Department of Justice
Division of Accounts, Wash. 25, D. C.

DESTINATION

APPROPRIATION CHARGEABLE

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUSCEIVED THEREBY)

ISSUING OFFICE

PICK-UP SERVICE AT ORIGIN \rightarrow BY THE GOVERNMENT OR ITS AGENT.
(CHECK "YES" OR "NO" HERE)

NAME AND TITLE OF ISSUING OFFICER

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

PACKAGES		DESCRIPTION OF ARTICLES (USE CARRIER'S CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE, OTHERWISE A CLEAR NONTECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS*	FOR USE OF DESTINATION CARRIER ONLY			
NO.	KIND				CLASS	GROSS RATE	NET	CHARGES DOLLARS CENTS

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT DATED
(F. O. B. PORT NAMED IN CONTRACT)

NAME OF TRANSPORTATION

COMPANY \rightarrow
DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF ISSUING OFFICER

SIGNATURE OF AGENT PER

CONSIGNEE'S CERTIFICATE OF DELIVERY—CONSIGNEE MUST NOT PAY ANY CHARGES ON THIS SHIPMENT

I CERTIFY THAT I HAVE THIS DAY RECEIVED FROM THE TRANSPORTATION COMPANY NAMED IN THIS CERTIFICATE THE PUBLIC PROPERTY DESCRIBED IN THIS BILL OF LADING IN APPARENT GOOD ORDER AND CONDITION, EXCEPT AS NOTED ON THE REVERSE HEREOF, AND THAT DELIVERY SERVICE AT DESTINATION \rightarrow BY THE GOVERNMENT OR ITS AGENT.
(CHECK "YES" OR "NO" HERE)
POUNDS
(CHECK WEIGHT IN LBS, OZS AND POUNDS)
(INITIALS)

I CERTIFY THAT I HAVE THIS DAY RECEIVED FROM THE TRANSPORTATION COMPANY NAMED IN THIS CERTIFICATE THE PUBLIC PROPERTY DESCRIBED IN THIS BILL OF LADING IN APPARENT GOOD ORDER AND CONDITION, EXCEPT AS NOTED ON THE REVERSE HEREOF, AND THAT DELIVERY SERVICE AT DESTINATION \rightarrow BY THE GOVERNMENT OR ITS AGENT.
(CHECK "YES" OR "NO" HERE)
POUNDS
(CHECK WEIGHT IN LBS, OZS AND POUNDS)
(INITIALS)

GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that the provisions of this bill of lading, properly accomplished and attached to freight receipts prepared in the manner prescribed by the Government forms, to the effect indicated on the face hereof, payment will be made to the last carrier, unless otherwise specifically stipulated.

- 1. Payment of charges shall be made by the shipper to the carrier named in the bill of lading, unless otherwise provided. On Government forms, to the effect indicated on the face hereof, payment will be made to the last carrier, unless otherwise specifically stipulated.
2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as bills of lading issued by the same carrier with the usual form provided therefor by the carrier.
3. Shipments made upon this bill of lading shall be subject to the same rules and conditions as bills of lading issued by the carrier, unless otherwise specifically stipulated.
4. No charge shall be made by any carrier for the reception and presentation of bills of lading in manifest and form as provided by the instructions hereon.
5. This shipment is made at the receipted or limited valuation specified in the tariff or classification at or under which the goods are shipped, unless otherwise indicated on this form hereof.
6. Receipt of this shipment, by the carrier, is subject to the same rules and conditions as bills of lading issued by the carrier, unless otherwise specifically stipulated.
7. In case of loss, damage, or shortage in transit, the carrier shall be liable for the full value of the goods, unless otherwise stipulated in writing within which notice thereof shall be given the carrier or to period within which claim therefor shall be made or suit instituted.
8. Carrier's rights to shipping charges are not affected by bills set out in the certificate of landing office.

INSTRUCTIONS

(See also General Regulations No. 97, issued April 13, 1941, by the Comptroller General of the United States.)

- 1. Drawers, incertainties, or abbreviations in bills of lading must be authenticated and explained by the person making them.
2. Original bill of lading, shipping order, Government freight receipt—original, Government freight receipt—copy, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order, Government freight receipt—original, and Government freight receipt—copy, shall be used in making a shipment. The original bill of lading and, if administratively required, not more than 3 memorandum copies will be sent to the carrier. The original bill of lading will be returned by the agent of the carrier. The original bill of lading will be returned to the consignee, as the original properly sent to the agent of the carrier. The original bill of lading then becomes the evidence upon which settlement for the service will be made. The consignee cannot sue the carrier for loss, damage, or shortage, or on its failure to receipt, the person receipting will certify that he is duly authorized to do so, receipting and authenticating, or on its failure to receipt, the person receipting will certify that he is duly authorized to do so, receipting and authenticating, or on its failure to receipt, the person receipting will certify that he is duly authorized to do so, receipting and authenticating.
3. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the presentation has been performed, except in the conversion of a commercial bill of lading as provided for in the above-cited General Regulations. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a certificate in lieu of bill of lading, on the standard form prescribed therefor which, when filed with the carrier, entitles the carrier to the amount of the bill of lading. The certificate must be countersigned by the bill of lading agent authorized by the carrier to the effect that the bill of lading was lost or destroyed, and that the carrier is not responsible for the loss of the bill of lading. The certificate must be countersigned by the bill of lading agent authorized by the carrier to the effect that the bill of lading was lost or destroyed, and that the carrier is not responsible for the loss of the bill of lading. The certificate must be countersigned by the bill of lading agent authorized by the carrier to the effect that the bill of lading was lost or destroyed, and that the carrier is not responsible for the loss of the bill of lading.
4. To insure prompt delivery of property, in the absence of the bill of lading, the consignee should give to the carrier a temporary receipt, executed on the prescribed form, for the property actually delivered. On the recovery of the bill of lading or certificate of the fact of its destruction, the carrier shall be furnished with a statement on said bill of lading or certificate of the fact of its destruction, and the said temporary receipt will be returned with the claim for payment thereon.
5. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in line thereof, as the case may be, before the receipting. All receipts shall be given to the carrier as soon as they are received, and the carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper.
6. Bills must be submitted by the general officers of carriers on voucher forms approved by the Comptroller General, Washington, D. C. A statement of the amount of the loss or damage to the property of the shipper, and the amount of the net amount claimed, must be submitted with each bill of lading or certificate. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper.
7. Correspondence regarding transportation matters shall be addressed to the particular office or service, and reference made to the letter specified and serial number of the Government bill of lading included in the company's bill.

SPECIAL NOTICE

The space on this bill of lading headed "FOR USE OF DESTINATION CARRIER ONLY" must not be covered by writing or marks. It is for the use of the accounting officer of the destination carrier.

ADMINISTRATIVE INSTRUCTIONS

1. Government property will be transported in the prescribed form of bill of lading, shipping order, Government freight receipt—original, Government freight receipt—copy, and memorandum bill of lading, as prescribed in the General Regulations. The bill of lading, shipping order, Government freight receipt—original, and Government freight receipt—copy, shall be used in making a shipment. The original bill of lading and, if administratively required, not more than 3 memorandum copies will be sent to the carrier. The original bill of lading will be returned by the agent of the carrier. The original bill of lading will be returned to the consignee, as the original properly sent to the agent of the carrier. The original bill of lading then becomes the evidence upon which settlement for the service will be made. The consignee cannot sue the carrier for loss, damage, or shortage, or on its failure to receipt, the person receipting will certify that he is duly authorized to do so, receipting and authenticating, or on its failure to receipt, the person receipting will certify that he is duly authorized to do so, receipting and authenticating, or on its failure to receipt, the person receipting will certify that he is duly authorized to do so, receipting and authenticating.
2. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in line thereof, as the case may be, before the receipting. All receipts shall be given to the carrier as soon as they are received, and the carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper.
3. Bills must be submitted by the general officers of carriers on voucher forms approved by the Comptroller General, Washington, D. C. A statement of the amount of the loss or damage to the property of the shipper, and the amount of the net amount claimed, must be submitted with each bill of lading or certificate. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper.
4. Correspondence regarding transportation matters shall be addressed to the particular office or service, and reference made to the letter specified and serial number of the Government bill of lading included in the company's bill.

REPORT OF LOSS, DAMAGE, OR SHORTAGE

Notice is hereby given the carrier to whom this bill of lading is surrendered that the shipment was received in condition above stated and that claim is made for the value of such loss, damage, or shortage as is described hereon. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper. The carrier shall be held responsible for the loss or damage to the property of the shipper, unless the carrier can prove that the loss or damage was caused by the negligence of the shipper.

Description:
Weight of such articles pounds.
Invoice value or cost of repairs, &
I certify that the facts noted above are correct.
By Comptroller
This
Endorsed: Filed March 31, 1959.

[Title of District Court and Cause.]

OPINION

The government filed a complaint for restitution against the above-named defendants, alleging jurisdiction under Title 28 U.S.C. § 1345, which reads as follows:

“Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.”

The complaint alleges that defendants in numerous transactions furnished to plaintiff trucking, hauling and other freight transportation services and “was and is a common carrier, subject to the Interstate Commerce Act, as amended, within the meaning of Section 322 of the Transportation Act of 1940, 49 U.S.C. § 66.” This section provides:

“Payment for transportation of the United States mail and of persons or property for on on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.”

The complaint alleges defendants submitted their bills and vouchers for payment to plaintiff; that plaintiff made payment without audit, but that subsequently the General Accounting Office proceeded to audit and settle the bills and vouchers presented by defendants, and that office determined there had been a total overpayment of bills and vouchers as presented by defendants in the sum of \$17,666.77. As a consequence of such audit the government commenced this action, demanding judgment for the aforesaid sum with interest and costs.

After the complaint was filed defendants moved to dismiss on the ground the complaint failed to state a claim and the Court lacked jurisdiction of the matter in controversy. In support of the motion to dismiss defendants filed various affidavits and points and authorities. A hearing was duly had upon defendants' motion to dismiss and for summary judgment, and thereafter said motions were denied.

Subsequently a pretrial was held by the Court, and the parties were ordered to present and file a pretrial statement of facts and issues involved. In due course of time a pretrial stipulation of facts and issues was filed by the respective parties, and the matter is now submitted to the Court for decision based upon the stipulation of facts and issues involved.

Three issues are now before the Court for decision:

1. Jurisdiction.

2. Whether plaintiff's cause of action was extinguished prior to filing the complaint; and

3. Whether plaintiff or defendants must sustain the burden of proof at a trial on the merits.

Plaintiff contends this Court has jurisdiction on the theory that defendants are common carriers, subject to the Interstate Commerce Act.

The stipulation of facts filed herein indicates that all shipments involved in these proceedings were tendered by plaintiff to defendants at a point in California for transportation to a destination in California and moved only over the public highways of the State. All transportation herein involved was performed for plaintiff by the defendants and moved on government bills of lading. None of the defendants at any time had on file with the Interstate Commerce Commission any tariff covering movement from, to or between any of the points pertinent in these proceedings. However, defendants, prior to said conveyances, had obtained a certificate of public convenience and necessity from the Public Utilities Commission of the State of California, authorizing defendants to transport furniture and certain related articles over the public highways of the State of California and not otherwise and had duly filed with the Public Utilities Commission as required its tariff schedule. Charges were alleged to have been made to the government by defendants in accordance with the tariff schedule.

There is no evidence in this case to indicate defendants at any time have engaged in transporta-

tion of any materials in interstate commerce. In fact, all shipments originated within the State of California and were delivered to points within the State. Defendants at no time attempted to comply with any requirement of the Interstate Commerce Act and did not file with the Interstate Commerce Commission any tariff covering movement of freight between points in the State of California or otherwise.

The government evidently contends that inasmuch as the freight in question was moved under government bills of lading it is necessarily implied that defendants were engaged in the movement of freight in interstate commerce. However, we are not of the opinion that any fact has been presented in this case which could lead to a conclusion that defendants or any of them at any time were engaged in interstate commerce. It is stipulated that defendants handled only intrastate merchandise. To maintain its position in this case the government must establish the common carrier in question is subject to the Interstate Commerce Act. We do not believe the government has so established.

A somewhat similar problem was presented in the case of *Hughes Transp., Inc. vs. United States* (Court of Claim, May 4, 1954), 121 F.Supp. 212. In that case the merchandise was transported over the public highways of the State of Kentucky from one federal enclave to another federal enclave, both situated within the State of Kentucky. The Court of Claims, at page 220, said:

“In the instant case the contract of carriage involved the transportation of property belonging to the federal government as shipper-consignee, by a contract carrier by motor vehicle licensed to do business in the Commonwealth of Kentucky. The performance of the contract necessitated the use of state highways between federal enclaves located wholly within the geographical boundaries of Kentucky * * * We do not agree with defendant that transportation over a State’s highways between two federal enclaves, located within a single State, amounts to interstate commerce. There is no federal legislation to support this view and there is nothing in the definition of ‘interstate commerce’ in the Federal Motor Carrier Act which supports such a conclusion.”

In the instant case the government contends it is entitled to recovery under the Public Utilities Act of California. However, the Public Utilities Act of California provides that claims based upon an overcharge such as alleged in the case at bar must be filed within three years after accrual of the cause of action. According to the stipulation of facts on file, the first shipment involved in this case was transported and delivered by defendants on July 3, 1943, and the last shipment was delivered on October 10, 1947. A period of nearly eleven years has elapsed between the last shipment claimed and the filing of the complaint.

Section 322 of the Transportation Act of 1940, 49 U.S.C. § 66, evidently has a three-year limitation

from the accrual of the cause of action, and the cause of action commenced upon payment. The defendants contend the government's action is barred by Section 736 of the California Public Utilities Code, which provides a three-year period for filing of complaints based upon overcharge. However, the government asserts that this is a statute of limitations; that it is not bound by such statute and that its claim is timely, even though presented after expiration of the three-year period.

It is the rule that ordinarily the government is not bound by a statute of limitations. There appear to be exceptions to the rule. Defendants allege this is not an ordinary statute of limitations but that upon the expiration of the period of time not only is the lawsuit barred but the very cause of action itself is automatically extinguished. Such seems to be the ruling of both the Interstate Commerce Commission and of the federal courts.

In *Louisville Cement Co. vs. Interstate Commerce Commission* (1918), 246 US 638, a mistake had been made in printing a tariff, and charges had been made according to the printed tariff. At that time, Section 16 of the Act to Regulate Commerce provided: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after." The Interstate Commerce Commission held it was jurisdictional that claims to be filed within the stated period. Upon a review of the Commission's conclusion, the Supreme Court said, at page 642:

“We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion * * *”

In 1925 the Supreme Court again ruled that the running of the time destroyed liability and stated:

“* * * It is settled by the decisions of this court that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. [Citations]. On the expiration of the two-year period, it was as if liability had never existed * * *”

—Danzer & Company, Inc. vs. Gulf & Ship Island Railroad Company, 268 US 633 at 636.

In 1943 the Supreme Court spoke again in regard to this matter in *Midstate Horticultural Co., Inc. vs. Pennsylvania Railroad Co.*, 320 US 356, stating at page 363:

“With the one exception, the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period ‘not only bars the remedy but destroys the liability.’ That is true of this Court’s decisions and those of the inferior federal courts.

* * *

“The purport of the decisions is that Congress intended, when the period has run, to put an end

to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished * * * In *United States ex rel. Louisville Cement Co. vs. Interstate Commerce Comm's*, 246 U.S. 638 * * * [t]he Court held that the limitation goes to the Commission's jurisdiction, so that on the one hand it has no power to act when the time has expired * * *"

From the above it is concluded plaintiff's cause of action does not arise under Title 49 U.S.C. § 66, inasmuch as the common carrier mentioned herein was not subject to the Interstate Commerce Act. Even if it were subject to the Act, the so-called cause of action has, nevertheless, been extinguished.

If the government had a claim under the Public Utilities Code of California, it is either barred or has been extinguished by the running of time.

We are of the opinion this Court has no jurisdiction of the claims as set forth by plaintiff and that the action should be dismissed.

Dated this 24th day of April, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed April 24, 1959.

[Title of District Court and Cause.]

STIPULATION

Plaintiff and defendants, through their respective counsel, hereby stipulate that the opinion of the Court filed in the above-entitled action on April 24, 1959, may be, and the same hereby is, the Findings of Fact and Conclusions of Law of the said Court in the above-entitled action.

Dated this first day of May, 1959.

LAUGHLIN E. WATERS,
RICHARD A. LAVINE,
BURTON C. JACOBSON,

By /s/ BURTON C. JACOBSON,
Attorneys for Plaintiff.

TURCOTTE & GOLDSMITH,

By /s/ J. O. GOLDSMITH,
Attorneys for Defendants.

It Is So Ordered this 1st day of May, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed May 1, 1959.

United States District Court, Southern District of
California, Central Division

Civil No. 313-58—HW

UNITED STATES OF AMERICA,
Plaintiff,
vs.

MELVIN A. PIXLEY, d/b/a Furniture Freight
Forwarders and/or FURNITURE FAST
FREIGHT, a Corporation,
Defendants.

JUDGMENT

Pursuant to the Court's Findings of Fact and
Conclusions of Law filed in the above-entitled action,
and good cause appearing,

It Is Hereby Ordered, Adjudged and Decreed
that the above-entitled action be, and the same
hereby is, dismissed.

Dated this 1st day of May, 1959.

/s/ HARRY C. WESTOVER,
United States District Judge.

Approved as to form:

LAUGHLIN E. WATERS
RICHARD A. LAVINE,
BURTON C. JACOBSON,

By /s/ BURTON C. JACOBSON,
Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1959.

Entered May 4, 1959.

[Title of District Court and Cause.]

MOTION TO RECONSIDER

Comes Now the plaintiff, United States of America, and respectfully moves the court to reconsider its ruling contained in its Opinion filed April 24, 1959, in which it dismisses the plaintiff's action on the grounds that the court has no jurisdiction inasmuch as the Government's action is barred by a statute of limitations contained in the California Public Utilities Code.

Dated: This 6th day of May, 1959.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney,
Chief, Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff.

EXHIBIT A

AFFIDAVIT

Washington,
District of Columbia—ss.

Hillis K. Wilson, being duly sworn, deposes and says:

I have been employed in the transportation organization of the U. S. General Accounting Office continuously since May 14, 1934, in the capacity of Examiner; Reviewer; Review Examiner; Assistant Chief, Freight Review Section; Chief, Freight Review Section; and since September, 1947, as Chief, Freight Subdivision. One of the functions of the General Accounting Office, under the provisions of 31 U. S. C. 71, is the examination and audit of paid bills for transportation of property for the United States by foreign and domestic common and contract carriers by rail, water, highway, air, or combinations thereof.

Prior to 1941 the Military Departments (War, Navy, and U. S. Marine Corps) audited carrier's bills prior to payment therefor, and thereafter such bills were subjected to a postaudit in the General Accounting Office.

Prior to 1941 payments for transportation performed for the civil agencies of the United States Government were audited in the General Accounting Office prior to payment, with some minor exceptions in the case of certain Governmental field establishments.

Any excess amount determined in the prepayment audit was adjusted by a reduction in the carrier's bills and a certification to a paying officer as to the reduced amounts payable with a technical explanation of the difference between the amounts claimed by the carrier and certified for payment by the pay-

ing officer. The technical explanation of the difference was furnished the carrier with the disbursing officer's check for the reduced sum.

Prior to 1941 any overpayment determined in the postaudit or audit after payment by a disbursing officer was stated as an exception in the settlement of the disbursing officer's account. Such exceptions embodied reference to carriers' bills, the bills of lading overpaid, showing as to each bill of lading the amounts paid, the amounts determined by the post-audit to be assessable and the sums overpaid, and technical authority or bases (published tariffs or special agreement) for the stated overpayments. These exceptions were a withholding of credit in the disbursing officer's accounts for the periods of payment and, generally speaking, the disbursing officers furnished the payee carrier with pertinent parts of the exception and demanded repayment of the amount suspended. Upon failure to receive repayment or justification for the stated overpayment, the disbursing officer recovered the overpayment by set-off against any subsequent amount found due the overpaid carrier. Thus, the disbursing officer was forced to make the adjustment with the overpaid carrier in order to reconcile his accounts.

Congress enacted the Transportation Act of 1940, approved September 18, 1940, and Section 322 of this Act, 54 Stat. 1955, 49 U.S.C. Section 66, provides that "Payment for transportation * * * of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Com-

merce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.”

The legislation enacted to relieve certifying and disbursing officers of responsibility for technical accuracy of carriers' bills, and the cited provisions of the Transportation Act, 1940, caused the General Accounting Office to forego statement of suspensions against the disbursing officers. 31 U.S.C. 82, 82b, 82c, 82g. Effective with the audit of payments made after enactment of the Transportation Act of 1940, claims have been prepared and forwarded by the General Accounting Office to the payee carrier for any overpayments determined in the audit. Collection of overpayments determined to be due the United States which were not refunded or justified by the carrier upon demand therefor have been accomplished by set-off, as provided in the cited Section 322.

Generally speaking, each carrier requires that Government bills of lading be forwarded to either a central or regional accounting office for audit and billing purposes. These bills of lading become the document or subvoucher supporting the carrier's claim for transportation charges and, under 4 C.F.R. section 52.24, 1958 Supplement, are attached to a

Public Voucher For Transportation Charges. This voucher form and the attached bills of lading become the carrier's bill for transportation charges and are submitted to a designated paying office of the Government agency for which the transportation service is performed. A carrier's bill may be supported by many bills of lading; some for interstate shipments and some for intrastate shipments, without separate totaling of the charges due. It is not feasible for paying officers to subject these bills, with both interstate and intrastate bills of lading attached, to two procedures. The carriers billing for intrastate service do not, of course, object to prompt payment. Under this type of arrangement, the payments must be subjected to postaudit in order to protect the interests of the Government. The system of audit avoids confusion in the handling of the great volume of paper, expedites the disposition and settling of public accounts, and is economically advantageous to the interested carriers and the Government. Because the audit of transportation charges is highly technical and requires considerable time, a prepayment audit of intrastate bills of lading would subject the payment of interstate bills of lading in the same bill to inordinate delay and would operate to defeat the purpose of the "payment upon presentation" provision of the Transportation Act, 1940.

From July 1, 1949, through June 30, 1958, a period of ten fiscal years, the Transportation Division, General Accounting Office, had audited over 16 million bills submitted by foreign and domestic common and contract carriers by all modes of transpor-

tation. These bills or paid vouchers in disbursing officers' accounts were supported by over 76 million bills of lading and accounted for an expenditure of approximately 12½ billions of dollars of Public Funds. Claims to recover overpayments were stated by the Transportation Division on over 900,000 of these carriers' bills and almost 400 millions of dollars have been collected by refund or by set-off. In this connection see *United States vs. Western Pacific Railroad Co.*, 352 U.S. 59, footnote 17 at page 74.

The foregoing is a true statement of the payment and audit policies of the General Accounting Office to the best of my knowledge and belief.

/s/ HILLIS K. WILSON,
Chief, Freight Subdivision, Transportation Division,
General Accounting Office.

Subscribed and sworn to before me this 20th day of April, 1959.

[Seal] /s/ CASSIE L. WOLFE.

My Commission Expires November 30, 1960.

[Endorsed]: Filed May 6, 1959.

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 8, 1959

Present: Hon. Harry C. Westover, District Judge.

Proceedings: For hearing motion of plaintiff for

reconsideration by the Court of the ruling contained in its opinion, filed April 24, 1959.

Court orders motion denied.

JOHN A. CHILDRESS,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this case on May 4, 1959.

Dated this 1st day of July, 1959.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Asst. U. S. Attorney, Chief,
Civil Division;

/s/ BURTON C. JACOBSON,
Asst. U. S. Attorney; Attorneys for Plaintiff,
United States of America.

[Endorsed]: Filed July 1, 1959.

In the United States District Court, Southern
District of California, Central Division

No. 313-58—HW Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MELVIN A. PIXLEY, et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney; by

JORDON A. DREIFUS,

Assistant United States Attorney.

For the Defendant:

F. W. TURCOTTE, ESQ.

Monday, June 8, 1959—10:00 A.M.

The Clerk: No. 2, 313-58, United States vs. Melvin A. Pixley, et al., hearing motion of plaintiff for reconsideration by the court of the ruling contained in its opinion, filed April 24, 1959.

Mr. Dreifus: Ready, your Honor.

Mr. Turcotte: Ready for the defendant.

The Court: Counsel, you seem to misapprehend

my conclusions in this case. There is nothing before the court to indicate at any time at all the defendants came under the jurisdiction of the federal authorities. All we have here is interstate commerce. If there is anything outside of interstate commerce, I don't know anything about it.

They have never filed any schedule with the federal authorities. They never were involved with the federal authorities in any way. Purely a State case.

If there is anything in the record other than that, I would like to know what it is.

Mr. Dreifus: If it please the court, the court's opinion in disposing of the case stated that it was dismissed for lack of jurisdiction.

The Court: That's right, because they have never come within the purview of the federal court.

Mr. Dreifus: I would like to point out to your Honor in our motion for reconsideration we very clearly stated that while there might be other problems in the case, we certainly feel that the United States as a plaintiff can bring a suit within the court's jurisdiction.

I think the court in deciding there was not jurisdiction simply holds that the Public Utilities Code of the State of California somehow limits the jurisdiction of the Federal District Court to entertain a suit by the United States.

The Court: No. You allege in the complaint that the furnishing of such services was subject to the terms of Section 322 of the Transportation Act of 1940, and I have held that it was no subject to that Act at all.

Mr. Dreifus: Then may I take it that your Honor is dismissing the case because our claim stated is erroneous or that our complaint fails to state a claim upon that ground, because we certainly feel our case is within the jurisdiction of the court.

The Court: It is not within the jurisdiction of the court, because if I have jurisdiction I am going to have to hold that it comes within the terms of Section 322 of the Transportation Act of 1940, and I specifically held it does not.

Mr. Dreifus: Then is your Honor also holding that there is no possible way in which we can amend our complaint?

The Court: No. This matter was submitted to the court upon the statement of facts and I rendered a decision upon the statement of facts. If you are not satisfied with my decision, you can go to the Circuit and maybe the Circuit will say that I am wrong. But I can't find where at any time the defendant attempted to bring itself within the jurisdiction of the federal authorities.

Mr. Dreifus: In other words, it is your Honor's decision it must be under the Interstate Commerce Act for the government to be in court.

The Court: Or the Transportation Act.

Mr. Dreifus: The Federal Transportation Act of 1940 as amended, the Interstate Commerce Act.

The Court: That's right. I thought I made that specific. I did go one step further, and probably I shouldn't have gone that step. I said if there is any jurisdiction, it would have to be under the California State Act, but you didn't claim any jurisdiction

under the California State Act, you didn't claim any relief under the California State Act. You only claimed under the Federal Act.

I think the government in its pleadings is held to be accountable as much as a private individual. You come in and plead jurisdiction on a certain statute, and if I can't find you come within that statute, I am going to have to dismiss for want of jurisdiction, am I not?

Mr. Dreifus: But then your Honor is stating that we can't come into court unless we can plead a cause of action under the California statute. Is that the tenor of your Honor's decision?

The Court: No. I said if you have any cause of action, it comes under the California Act. The only theory on which the government can contend that this court has jurisdiction is that you used a government bill of lading. I don't think that is sufficient at all.

I am perfectly satisfied with my opinion in this case. You may not be, but I am.

The Motion is denied.

Certificate

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein,

and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of July, 1959.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed September 21, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

1. Complaint.
2. Motion & Notice of Motion to dismiss together with proposed findings of fact & conclusions of law & proposed summary judgment.
3. Opposition to defendants' motion to dismiss & for summary judgment.
4. Minutes of the Court for January 12, 1959.
5. Minutes of the Court for January 13, 1959.
6. Answer.

[Endorsed]: No. 16618. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Melvin A. Pixley, d/b/a Furniture Freight Forwarders and/or Furniture Fast Freight, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: September 25, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16618

UNITED STATES OF AMERICA,

Appellant,

vs.

MELVIN A. PIXLEY, d/b/a FURNITURE
FREIGHT FORWARDERS and/or FURNI-
TURE FAST FREIGHT, a Corporation,
Appellees.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

1. The District Court erred in holding that it did not have jurisdiction of the claim by the United States to recover overpayments on transportation services performed for it by appellee.

2. The District Court erred in holding that the United States' cause of action to recover overpayments on transportation services performed by appellee was barred by the statute of limitations contained in Section 736 of the California Public Utilities Code.

LAUGHLIN E. WATERS,

United States Attorney;

RICHARD A. LAVINE,

Assistant U. S. Attorney,

Chief, Civil Division;

/s/ JORDAN A. DREIFUS,

Assistant U. S. Attorney; Attorneys for Appellant,
United States of America.

[Endorsed]: Filed October 8, 1959.

